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MEMORANDUM OF CONVERSATION

Subject: ~~Informal Discussions~~ on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:

Mr. Morio YUKAWA, Director, Economic Affairs Bureau
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:

Mr. Frank A. WARING, Counselor for Economic Affairs
Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Monday, February 25, 1952. FIRST INFORMAL MEETING

Mr. Waring greeted Mr. Yukawa and his fellow representatives and expressed the hope that the informal discussions about to begin on the proposed Treaty of Friendship, Commerce and Navigation between Japan and United States would prove to be mutually satisfactory. Mr. Waring added that the various questions raised by the Japanese representatives during the preliminary and exploratory talks on December 4 to 22, 1951 could now doubtlessly be resolved in view of the sympathetic and careful study given these by the Department of State. The detailed comments received from the latter would, in Mr. Waring's opinion, be most helpful in the present informal discussions.

Mr. Waring added that he took this opportunity to reassure the Japanese representatives that the proposed Treaty under discussion is altogether a standard draft, identical in all particulars with that currently proposed by the United States for negotiation with other countries. Knowing that this question had been raised by the Japanese representatives during the exploratory talks in December, Mr. Waring stated that any differences between the draft under discussion and recently signed treaties reflect, in part, revisions resulting from further study and from experience gained through negotiation, and have been adopted in the interests of improving the readability and adequacy of the standard draft as a general basis for negotiation. Some differences reflect individual modifications and adjustments which have been formulated during the course of a particular negotiation in the process of adapting the standard draft on a mutually satisfactory basis to the views and circumstances of the particular country concerned.

Mr. Waring further stated that the standard draft Treaty under discussion has now reached an advanced stage of evolution, but that the process of studying ways in which it may be still further improved has not ceased. He pointed to amendments to the standard draft recently received from the Department of State as an indication of the continued refinements and improvements sought. Mr. Waring invited the attention of the Japanese officials to the new paragraph, the inclusion of which in Article X of the Treaty is proposed, as well as to the suggested paragraph (temporarily designated 3-bis) for addition to the proposed Protocol. Although material of the nature covered by the suggested addition to the Protocol has not heretofore been standard in United States treaty practice, the Department of State saw merit in the suggestion advanced by the Japanese representatives in Article XXVII of the proposed Japanese draft. Mr. Waring stated that the inclusion of this new provision - based on the Japanese suggestion - is an example of the continuing efforts towards improvement of the standard draft.

Mr. Waring then referred to questions previously raised by the Japanese representatives during the exploratory talks in December regarding any possible relationship between the proposed Treaty and the two immigration and naturalization bills (S.2055 and H.R.5678) presently before the United States Congress. Mr. Waring explained that these bills are the culmination of long labor and study by the competent congressional committees and of exhaustive public hearings, and are now in a very advanced stage of development. Although Congressional action cannot be forecast, said Mr. Waring, informed observers expect legislation along the lines of these bills to be enacted during the current year. The Department of State firmly

supports that feature of these bills which repeals the Act of May 26, 1924, removes the bar to naturalization of Japanese, and authorizes an immigrant quota for Japanese.

Mr. Waring stressed, however, that it was essential in the present discussions clearly to understand that the standard draft Treaty, presented in the December discussions, was formulated for general use with other countries long before a negotiation with Japan was contemplated. This Treaty - perfectly straightforward in all its parts and provision - stands on its own provisions, irrespective of the Act of 1924. Although the more technical aspects of the Treaty provisions would be further clarified in the present discussions, Mr. Waring emphasized that the proposed Treaty would if ratified become the supreme law of the land, enforceable as such before the courts of the United States, and would be paramount over existing state legislation. He added that the conclusion of the proposed Treaty - based as it is on the very highest principles of justice, morality and equal dealing - would hardly be possible except under psychological conditions opposite to those which led to the Act of 1924. Mr. Waring pointed out that this Treaty in and of itself - apart from any action with respect to the Act of 1924 - would gain for Japan the same high objective represented by the possible repeal of that Act.

Mr. Waring stated that it should be clearly understood that the informal conversations about to begin are on an ad referendum basis, and that any changes in the standard draft or the counter-proposals thereto which might be discussed during these meetings are, of course, subject to subsequent formal acceptance by both Governments. Mr. Waring added that informal discussions of this kind often effectively dispose of many points which may not again be raised in the formal negotiations. The record of the preliminary discussions may therefore be the only record to which reference can be made in later years for the purpose of verifying the interpretation intended to be given some passage in the treaty. Mr. Waring suggested therefore that the Office of the United States Political Adviser prepare office-file memoranda of conversation covering the present discussions, which it would invite the Japanese representatives to inspect in rough draft for the purpose of noting any necessary corrections. Copies of the mutually approved memoranda duly initialed would then be furnished the Ministry of Foreign Affairs - for its own files and those of its Washington representatives - and other copies would be filed with the Department of State and the United States Mission in Tokyo.

Mr. Waring expressed his concern regarding press coverage of the present informal discussions, and pointed to the fact that these had already been reported by various Tokyo newspapers as "negotiations". Since every effort should be made to erase this misunderstanding on the part of the press, Mr. Waring suggested that no

statements be released or interviews be granted to the press by either side without the prior concurrence of the other. He further suggested that press statements be issued jointly wherever possible. Mr. Yukawa agreed with Mr. Waring and further proposed that periodic statements with respect to the nature of, and the procedures to be followed in, the current conversations be released jointly by the Ministry of Foreign Affairs and the Office of the United States Political Adviser during the course of the informal discussions.

Mr. Adams inquired whether the Japanese Representatives desired to open the present informal conversation on the Department of State's standard draft of the Treaty of Friendship, Commerce and Navigation (hereinafter referred to as the standard draft or FCN Treaty) with a discussion of the Preamble. Mr. Yukawa replied in the affirmative and suggested that each provision of the FCN Treaty be discussed in its proper numerical order.

PREAMBLE

Mr. Yukawa stated that the phrase "promoting mutually advantageous commercial intercourse" should properly come before the phrase "encouraging mutually beneficial investments", since this would be a more logical sequence in his opinion. Mr. Adams stated that there appeared to be no objection to the inversion of these two phrases, and suggested that the standard draft be modified as proposed by Mr. Yukawa for the purpose of continuing the present informal discussions.

Mr. Yukawa further stated that the word "otherwise" in the phrase "otherwise establishing mutual rights and privileges" was not clear to the Japanese side, and he proposed its deletion. Mr. Adams replied that this suggestion had also been made in the exploratory talks in December and had therefore been referred to the Department of State for comment. Mr. Adams added there appeared to be no objection to the deletion of the word "otherwise" and that it would be deleted for the purpose of the present discussions, (subject to formal acceptance by the Department of State).

Mr. Yukawa then referred to the phrase "the principles of national and of most-favored-nation treatment unconditionally accorded", and stated that he regarded national treatment, from its nature, unconditional, and that the Article should be drafted so that the adverbial phrase "unconditionally accorded" would not apply to national treatment. Mr. Yukawa proposed, therefore, that this phrase be amended to read "the principles of national and of unconditional most-favored-nation treatment".

Mr. Bassin replied that - in response to an earlier and similar suggestion from the Japanese side - the Department of State had indicated that it realized the Japanese side might perceive some novelty in phraseology stipulating "unconditional national treatment". The adjective "unconditional" is commonly placed in juxtaposition with most-favored-nation treatment only, but Mr. Bassin pointed out that the wording suggested in the standard draft avoids literally saying "unconditional national treatment". Mr. Bassin added that the Department of State wishes to establish the proposition in its standard draft that national treatment provisions are in general to be applied untrammeled by specific reciprocity qualifications. As an illustration Mr. Bassin referred to the national treatment clause occurring in paragraph 1 of Article IV of the FCN Treaty dealing with the subject of workmen's compensation. He stated that it might be that the laws of a state in the United States generally provide compensation for occupational diseases, whereas the laws of Japan might not. The United States position in this event would be that Japanese workmen in the United States would be entitled to the benefits provided by domestic law (for example, for silicosis) notwithstanding the fact that an American workman in Japan could not claim any such benefit because the Japanese law failed to cover silicosis. Mr. Singer stated that "national treatment" in the United States means the same treatment that American citizens receive in the United States, without reference to what Japanese subjects receive in Japan, and vice versa. Mr. Singer added that in the opinion of the Department of State the national treatment obligation operates automatically and without conditions.

Mr. Yukawa and Mr. Otabe declared that this concept of national treatment was acceptable to the Japanese side, and they agreed that Japan would grant national treatment in an unconditional manner. Both Mr. Otabe and Mr. Mori stated that their question regarding the word "unconditionally" was based on the difficulty of translating this phrase into Japanese in such a manner as to avoid its juxtaposition with the words "national treatment".

Mr. Adams stated that the Department of State had found that the particular phraseology employed in the standard draft met this problem adequately, and inquired whether the placing of the word "unconditionally" in the Japanese translation of the Preamble might not take into account the question raised by Mr. Yukawa. Mr. Singer then suggested that the phrase in question remain in its present form in the English language, and that the Japanese language text be so drafted as to avoid the use of the phrase "unconditional national treatment", but with the understanding that the meaning of the English text of the Preamble - as previously clarified by Mr. Bassin and himself - would not be changed.

Mr. Yukawa stated that it was agreeable to the Japanese side to permit this clause to remain in its present form in the English language. He added that the construction of the phrase "based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded" was inappropriate in the Japanese language, and that, in order to avoid the justaposition of the words "unconditionally accorded" and "national treatment", this phrase would be translated into Japanese as "based in general upon the principles of national and unconditionally accorded most-favored-nation treatment". Since it had already been agreed by the Japanese side that national treatment would be extended by Japan in an unconditional manner, Mr. Yukawa asked whether the translation into Japanese, as specified above, would be accepted by the American side as an appropriate translation. Mr. Singer replied in the affirmative.

Mr. Bassin then asked if there were any other proposed changes besides those mentioned (which would amend the Preamble to read, in part, "promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges ....."). Mr. Yukawa having replied that the Preamble with the changes proposed would be acceptable to the Japanese, Mr. Adams proposed that the discussions continue with Article 1 of the standard draft.

ARTICLE I

Mr. Yukawa declared that it was difficult for the Japanese side to grasp the meaning of the words "equitable treatment", and that - in his opinion - it would be still more difficult to apply such treatment in specific cases. Mr. Otabe pointed out that the Economic Council of the League of Nations had several times attempted to clarify the meaning of the phrase "equitable treatment" (as mentioned in Article 23 e of the Covenant of the League of Nations), but that no accepted agreement had been possible as to its specific application in view of the widely divergent views of member countries on the relation between most-favored-nation treatment and "equitable treatment". Mr. Yukawa further stated that if this phrase was intended merely to express the friendly relations between the two parties he believed it should be included in the Preamble, and that Article I could then be deleted.

Mr. Bassin replied that Article I is in part a link between the Preamble and the rest of the FCN Treaty, and that it introduces the Treaty by declaring the equitable purposes the Treaty is designed to serve. Mr. Bassin added that Article I additionally serves a further and two-fold purpose: it suggests that where two constructions of the FCN Treaty's provisions are equally possible in a given instance,

the construction leading to an equitable - or just - result is to be preferred. Mr. Bassin stated that this principle is in conformity with established doctrine, as followed by the courts in the United States, that treaties are to be construed and applied in a broad and liberal spirit. The second purpose accomplished by Article I is that it serves as a guiding principle in cases where the exact terms of the treaty's provisions do not afford complete and definitive guidance. Mr. Bassin illustrated this second point by stating that it has been standard practice to use the "equitable treatment" standard with respect to treaty rules on state trading (as covered in Article XVII, paragraph 2, of the standard draft), where it has not proved possible yet to devise a more precise ruling owing to the nature of the subject matter dealt with. Mr. Bassin added that the Department of State is of the opinion that it would probably be only in extreme or unusual cases that Article I could afford a basis for a treaty protest, independently of the other provisions of the Treaty, since the more exact legal rules of the latter define the normal commitments the two countries will have undertaken.

In response to further mention by Mr. Otabe and Mr. Mori of the difficulties encountered in the League of Nations with the phrase "equitable treatment", Mr. Adams stated that the Department of State is fully aware that the word "equitable" is not a precise term, but that its usage established the spirit of friendly and just dealing which is the purpose of the FCN Treaty. Mr. Adams added that this term is not a novel one in current international usage, and that the term is to be found in the ITO Charter and in other international instruments, in the FCN Treaties recently concluded by the United States with other countries, and in recent standard literature dealing with international law and justice. Mr. Adams suggested that the Japanese representatives think of "equitable treatment" in terms of "fair, just and non-discriminatory treatment" in attempting to understand the purpose of Article I, which he further defined as the "friendship provision" of the FCN Treaty.

Mr. Otabe and Mr. Kanematsu stated that they believed "equitable treatment" might be interpreted as establishing a new standard of treatment in addition to national and most-favored-nation treatment, and that they questioned whether the granting of national and/or most-favored-nation treatment is not sufficient when such obligations are required under each standard draft Article. Mr. Otabe stated that the term "equitable treatment" might prove to be controversial, and suggested that consideration be given its deletion.

Mr. Adams said that "equitable treatment" did not establish a third standard of treatment in addition to national and most-favored-nation treatment.

Mr. Singer and Mr. Adams urged the Japanese representatives to regard "equitable treatment" as a guiding principle of justice under which the specific standards of national and most-favored-nation treatment are applied.

Mr. Yukawa asked if official notification involving rights and obligations of a national or company of the other party could be made public only in the Japanese language without violating the provision of equitable treatment. Mr. Bassin replied that under these circumstances the provisions for equitable treatment would not be violated.

Mr. Yukawa said that it was his understanding that the provision of equitable treatment could not be used to impose a discriminatory tariff against the goods of the other party on the grounds that the standards of wages or living of that party were lower than that of any third country. Mr. Yukawa added that this argument was made by some countries on the application of most-favored-nation and equitable treatment at meetings under the sponsorship of the League of Nations.

Mr. Bassin said that Mr. Yukawa's understanding was acceptable.

Mr. Yukawa expressed his appreciation for the explanations given him of the meaning of "equitable treatment" and stated that further study would be given this point by the Japanese representatives, pending which he would reserve his position regarding the acceptability of this term and Article I to the Japanese side. Having no further questions regarding this Article at the present time, Mr. Yukawa proposed that the discussion continue with Article II.

ARTICLE II

Mr. Yukawa stated that the Ministry of Foreign Affairs had studied the printed texts of various FCN Treaties entered into by the United States with other countries, and pointed to the inclusion of most-favored-nation treatment in other United States Treaties with respect to the rights of entry granted under Article II, paragraph 1. He proposed, therefore, the inclusion of the most-favored-nation treatment concept in this paragraph in a manner similar to that employed in the FCN Treaty between Italy and the United States.

With respect to the FCN Treaty between Italy and the United States, Mr. Bassin invited the attention of the Japanese representatives to Article XXIV, paragraph 7, of that particular treaty. Mr. Bassin pointed out that the most-favored-nation provision in the Treaty with Italy was very greatly modified by Article XXIV of the same treaty, so that the net result is the same as that of the standard

draft under discussion. Mr. Bassin added that the technique of the Treaty with Italy in this connection could be improved to avoid misleading impressions. Mr. Singer added that the Department of State no longer considers that the most-favored-nation standard adds anything to a provision which deals with elementary human freedoms, and might, in fact, serve only to weaken it.

Mr. Otabe declared that the primary concern on the Japanese side was with clause (b) of paragraph 1 which reads "for other purposes subject to the laws relating to the entry and sojourn of aliens". He stated that unless a most-favored-nation standard were included in this clause the Japanese side would encounter great difficulties in Diet interpellations with respect to the rights of entry of Japanese into the United States, particularly in view of the Act of May 26, 1924, and its restrictions on Japanese immigration.

Mr. Yukawa suggested that "most-favored-nation treatment" be extended to the matters mentioned in paragraph 1, and added that if under the existing laws of the United States it is impossible to insert the most-favored-nation clause without reservation, the date of the enforcement of the foregoing treatment may be put off, by a separate arrangement, to some later date when the present immigration laws of the United States are revised.

Mr. Singer repeated his previous statement to the effect that the most-favored-nation standard adds nothing to a provision dealing with elementary human freedoms. Mr. Adams then referred to the remarks made previously by Mr. Waring on the subject of immigration bills presently under consideration by the Congress of the United States. He added that the House of Representatives' and Senate Judiciary Committees have both now reported on these immigration bills, thus making Congressional action on the bills possible in the not too distant future. Mr. Singer referred to Mr. Waring's statement that the FCN Treaty would be paramount over all existing statutes and state legislation, and added that it would therefore assure the right to enter and remain in the territories of the other party in accordance with paragraph 1, Article II. Mr. Adams stated that in view of these remarks it was believed that the suggested "separate arrangement" was unnecessary and inappropriate.

Mr. Yukawa stated that further consideration would be given by the Japanese side to Article II, paragraph 1, in the light of the comments made by Mr. Waring and the other American representatives, and suggested that further discussion on this point be deferred for subsequent meetings.

Mr. Adams proposed that the present meeting adjourn and that discussions be resumed on Article II when convenient to the Japanese representatives. Mr. Yukawa suggested that the next meeting be held on Wednesday, February 27, 1952, a date which was acceptable to both sides.

/S/ M. YUKAWA

Morio Yukawa
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/S/ FRANK A. WARING

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